
Montreal
1967
Sept. 13-15

BETWEEN:

STEPHEN SURA ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Income or capital gain—Company incorporated to carry on promoter's house-building business—Sale of land to company by promoter—Intention—Whether business profit.

In 1954 appellant caused the incorporation of a company to carry on a house-building business which he had previously carried on himself and thereafter it was his practice to buy land for the company on his own account and sell it to the company at cost when the company needed it. In 1954 he purchased a large parcel on Montreal Island for a housing development but he was unable to arrange financing and the land remained idle until 1960 when he accepted a profitable offer for a large part of it.

Held, although appellant's sole intention in acquiring the land was to use it in the company's house-building business the transaction was

designed to benefit him as a shareholder of the company and his profit from the transaction was therefore profit from a "business" within the enlarged meaning of that word in the *Income Tax Act*. *M.N.R. v. Taylor* [1956-60] Ex. C R. 3, applied.

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INCOME TAX APPEAL.

John Ewasew, Q.C. for appellant.

P. F. Cumyn and *P. R. Coderre* for respondent.

JACKETT P.:—This is an appeal from a decision of the Tax Appeal Board dismissing an appeal from the appellant's assessment under the *Income Tax Act* for the 1960 taxation year.

The question to be decided is whether the appellant was rightly assessed for that year on the basis that a profit made by him on the disposition of certain land is profit from a business within the meaning of the word "business" as used in the *Income Tax Act*.

The appellant was, prior to 1954, engaged in the business of building houses—some under contract for others and some on his own account for re-sale. In so far as he built the houses on his own account for re-sale, this business involved acquiring land, building houses on the land so acquired, and selling the land with the houses on it.

Early in 1954, the appellant caused a company—Stephen Sura Inc.—to be incorporated, and from that time on, the appellant carried on for the account of the company the business that he had previously carried on for his own account, with this additional feature, that, when he—as Stephen Sura—found land that he decided should be acquired to be used in the company's house building business, he acquired it on his own account and so held it until the company was ready to acquire it and use it, at which time he sold it to the company at its cost to him.

In 1954 the appellant embarked, for the first time, on a large scale low-cost housing development. It had apparently been a "dream" of his that he should ultimately carry out such a development in addition to the business, in which he had been very successful, of building relatively expensive homes in well established residential areas on Montreal Island.

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According to his story, which I accept, he allowed himself to be persuaded that a very long, narrow piece of farm land in an undeveloped municipality on Montreal Island was so situated, having regard to, among other things, the availability of cooperation from the local authorities, that, notwithstanding its remoteness from built-up areas, it was an attractive site for the realization of his "dream". Strangely, the appellant's usual business acumen was so beclouded by the persuasiveness of the persons who took an interest in having him embark on this project that he bought the land in question at a cost of $44,000 even though, while he knew that he could not proceed with this building scheme without finding someone to finance the construction of the houses, he had taken no steps to ensure that he would obtain the necessary financing except to ascertain by verbal inquiry that the land was in an area where Central Mortgage and Housing Corporation would guarantee loans.

Having so bought the property, without any solid assurance of financing, the appellant very soon found out that no lending company would lend money for a housing development in the area where the property was. At that moment he realized that he was "stuck" with this land and he "just left it" as it was as he saw no alternative to waiting in the hope that things would change in the future.

In 1957, Hydro Québec acquired a servitude over part of the land, either by expropriation or by virtue of having power to expropriate, and Canadian National Railways expropriated a part of the land. Apart from those transactions, the situation in relation to this land remained uneventful from early 1955 until 1960 when an offer was made to the appellant as a result of which he sold a large part of the land to a purchaser for a consideration of $95,830. It is the part of the profit from this sale that the Minister attributed to the 1960 taxation year that is in issue in this appeal.

The appellant's position is that the sole reason motivating the appellant in acquiring the aforesaid tract of land in 1954 was the use that it was intended should be made of that land in the house-building business of Stephen Sura Inc. Counsel for the respondent did not contend that I should find that the appellant had any other purpose

in mind at the time of the acquisition. This is not, therefore, a case of a profit from a purely speculative acquisition of land; nor is it a case of an acquisition for a primary purpose that was also motivated by an anticipation that, in any event, the property acquired could be turned to advantage at a profit (popularly referred to as a "secondary intention"). This is a case where property was acquired for use in the current operations of a business and for no other reason.

I propose to consider the problem first as though Stephen Sura Inc. were the appellant and had acquired the land to be used in a house-building business that it was carrying on, and then I propose to consider whether the situation is any different where the land was acquired by the appellant for the purpose of re-sale at cost to his wholly-owned company to be used by that company in a house-building business that it was carrying on.

It helps me to appreciate the problem if I think of the business of purchasing land, erecting buildings and selling improved land with buildings on it as being the same in principle as the business of buying leather and other raw materials, manufacturing boots and selling the boots. In each case, the business consists in acquiring the ingredients, manufacturing something that is merchantable and selling the finished product; and the profit consists of the proceeds of disposition less all the costs of making the product sold.

The situation here (on the assumption that the land had been bought in the name of the company and that the company is the litigating taxpayer) is that the taxpayer, while it was carrying on an active business of buying land, erecting houses and selling the land with houses on it, acquired this large tract of land in a neighbourhood where houses were not then being built, with the purpose of launching a large-scale house-building programme, which programme, if it had been launched, would have been an extension of its already existing business; and quickly found that, because its management had been too optimistic and trusting about financing arrangements, it could not launch such programme and had acquired land for use in its business which, at least for the time being, it could not utilize. Not only could such land not be utilized in the business, but, if I properly understand the evidence, there was at

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that time and for several years after that time, no alternative way of using or disposing of the land so as to realize the money that had been put into it. In other words, $44,000 had been put into property for use in what was, in effect, a manufacturing business, but, by reason of the poor judgment shown in acquiring it, no use could be made of the property at the time of acquisition.

Going back to my analogy with the boot manufacturer, it is the same, as I see it, as if the boot manufacturer had bought a large stock of raw leather for use in his manufacturing business, had then discovered that there was no market for the kind of boots that he could make out of that leather and, there being no immediate way of realizing the money so expended, had left such leather in his warehouse until a demand arose for it some six years later.

So regarded, the land was land that had been acquired in the course of the operation of a profit-making business and that was still being held as part of the assets of the business when it was sold. The profit from a sale of such land was therefore a profit from the business, and, as it arose from a sale, in the course of the business, of raw materials designed for use in making the finished product of the business, it was a profit from the operation of the business and not a profit of a capital nature.

If, therefore, the appellant had so carried on his house-building business that he did everything for the account of his wholly-owned company (or if he had done everything for his own account), I should have no doubt that the profit from this sale of property acquired as raw material for his business of producing houses was a profit from the business and must, therefore, be included in computing the income from the business for tax purposes.

The situation is complicated, however, as I have already indicated, by the fact that the appellant was not carrying on the house-building business on his own account but was the "management" of the company on whose account that business was being carried on when he bought the land in question on his own account to hold it until the company was ready to acquire and use it.

It should be noted that there were financial advantages to the company (and thus indirect financial advantages to

the appellant as its shareholder) in having the land acquired and held during such a period by someone who would then sell it to the company at cost when it was ready for it.

Accepting, as I do, the appellant's testimony that he had no intention of making an immediate profit out of the acquisition of the land and the sale thereof to his own company, I cannot escape the conclusion that the acquisition was, from the appellant's point of view, a transaction of a business character designed to result in an ultimate benefit to him inasmuch as he would be entitled, as shareholder, to whatever profits the company made. Indeed, I cannot distinguish the facts in this case, from this point of view, from the facts in *M.N.R. v. Taylor*.[1] Just as the respondent in the *Taylor* case was substantially, if not exclusively, motivated in buying the lead for re-sale to his employer on pre-arranged terms by his desire to facilitate his employer's business for the benefit that he would get from its increased profits, so here, I must conclude that the appellant was motivated in buying the land for re-sale to his company on pre-arranged terms by his desire to facilitate the company's business for the benefit that he would get from its increased profits.

Having reached that conclusion, I must conclude, as President Thorson did in the *Taylor* case, that the property having been acquired in the course of an operation of a business character, a profit from its disposition, at least in the circumstances under which the land was sold in this case, is a profit from a "business" within the extended meaning of that word as used in the *Income Tax Act*.

The appeal is dismissed with costs.

[1] [1956-60] Ex. C.R. 3.